LIBRARY
SUPREME COURT, U. S.

Clerk, Supreme Court, U.S.
FILED
OCT 9 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 19[redacted]

No. [redacted]13

CARL STEELE,

Petitioner,

v.

THE NORFOLK AND WESTERN RAILWAY COMPANY, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA.

BRIEF OF THE BROTHERHOOD OF RAILROAD TRAINMEN AS AMICUS CURIAE

JOHN J. NAUGHTON,
[redacted] North Clark Street,
Chicago, Illinois,
Attorney for Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1960.

No. 713

CARL STILL,

Petitioner,

VS.

THE NORFOLK AND WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA.

BRIEF OF THE BROTHERHOOD OF RAILROAD TRAINMEN AS AMICUS CURIAE.

Preliminary Statement.

Interest of the Amicus Curiae.

This case squarely presents the issue of the meaning and effect of the Brotherhood's collective bargaining contract which requires the respondent to reject an application for employment within 30 days. Respondent, despite the

time limitation provided in the applicable collective bargaining contract, based its defense to the petitioner's action under the Federal Employers' Liability Act on the petitioner's alleged fraud in his application for employment which was filled out more than six years before the petitioner's accident. The trial court directed a verdict for respondent and thereby nullified the contractual time limitation established by the Brotherhood's contract.

The nature of the interest of the Brotherhood of Railroad Trainmen in this case is twofold: 1) The Brotherhood is interested because the ruling of the trial court nullified and set aside the time limitation which the Brotherhood had established by contract. 2) The Brotherhood's interest is also involved because one of its members was denied his right to a jury trial under the Federal Employers' Liability Act by means of a contract or device prohibited by Section 5 of that Act, 45 U.S.C. 55.

It is our position that the court below erred because it voided the contractual provision establishing a time limitation and because it permitted the respondent to avoid its liability despite the provisions of Section 5, 45 U.S.C. 55.

ARGUMENT.

I.

The 30 day time limitation provided in the applicable collective bargaining agreement within which respondent was required to reject applications for employment created an absolute right to seniority as an employee, after the expiration of the 30 days, as against any claim by the respondent that the application for employment contained misrepresentations of any nature.

The action of the trial court in ruling that petitioner was not an employee, based on alleged misrepresentation made by petitioner in his application for employment over six years before his injury, erroneously nullified the collective bargaining contract between this Brotherhood and respondent. For this error alone, the judgment of the trial court should be reversed. An affirmance thereof would be unwarranted in law and unwise in fact. As a matter of law, the contract involved is clear and unambiguous and, being so, it requires that petitioner be considered an employee for all purposes including that of bringing an action under the Federal Employers' Liability Act. *45 U.S.C. § 51, et seq.* As a matter of fact, the action of the trial judge constituted a rewriting of the collective bargaining contract so as to exempt rights granted by the FELA from that contract. No such exemption is justified. This plain error should be reversed because the petitioner thereby was denied substantial justice and in order to take the trial courts out of the business of rewriting collective bargaining contracts.

The relevant facts are few, simple, and undisputed. Petitioner first applied for employment with respondent over six years before the injury involved in this case. At

that time, he filled out his only application for employment. Respondent complained below that he therein misrepresented his physical condition even though petitioner was contemporaneously given a physical examination. Petitioner was discharged before his accident and was off work for over a year. Before his accident, petitioner was rehired by respondent and put to work without either a physical examination or an application for employment.

Throughout this period, the applicable collective bargaining contract provided in Section 17 (c):

> "Applications for employment will be accepted or rejected within thirty (30) days. If not notified within thirty (30) days, applicant will be considered accepted."

Petitioner below raised many objections to the trial court's ruling that petitioner, as a matter of law, was not an employee or respondent. The single paramount issue in this case, however, is that the petitioner was an employee because he was entitled to such rights by virtue of the fact that he was never notified that his application for employment was rejected, either within the 30 day period provided or thereafter. The trial court committed clear error in directing a verdict for respondent on its finding that plaintiff was, as a matter of law, not an employee and not entitled to bring an action under the Federal Employers' Liability Act. That error is manifest whether the trial court ignored the collective bargaining provision or whether it decided that the provision was not applicable. The meaning and effect of that provision was, of course, a question of the construction and effect of a written instrument and was, therefore, a question of law exclusively for the court rather than for the jury. *Swift & Co.* v. *Hocking Valley R.R.* 243 U.S. 281. That question of law was simple and uncompli-

cated. As this Court held in *Minneapolis, St. P. & S. Ste. M. Ry.* v. *Borum*, 286 U.S. 447, 449, in interpreting a similar rule:

> "The application was not rejected within 30 days, and, under rule 22, must be deemed to have been finally accepted."

Since petitioner was an employee for all purposes under the collective bargaining agreement, he was entitled to the protection of the federal acts. *Blanton* v. *Northern Pac. Ry.*, 215 Minn. 442, 10 N.W. 2d 382 (Point 2 of Court's syllabus: "Where plaintiff had worked for railroad more than 90 days when injured and had not been rejected, he became an employe of railroad under railroad's rule relating to applicants for positions in its yard service, and, as such, he was under the protection of the federal employers' liability and safety appliance acts.") Here the collective bargaining contract was received in evidence and, for that reason, the instant case differs from the majority of those cases in which courts, other than this Court, have ruled on defenses based on an alleged fraudulent employment application. The instant case also differs from the first case in which this Court ruled on the affirmative defense asserted here, the case of *Minneapolis, St. P. & S. Ste. Marie Ry.* v. *Rock*, 279 U.S. 410 (1929). Mr. Justice Butler wrote *that* opinion and in *Minneapolis, St. P. & S. Ste. Marie Ry.* v. *Borum*, 286 U.S. 447, 450 (1932), distinguished the *Rock* case because *Rock* had failed the physical examination required and had then obtained another man to take his physical examination when he applied again under a different name. The *Rock* case is also different from the instant case in that there was no evidence that any collective bargaining contract was applicable.

The factual differences between the instant case and *Rock* are manifest but if a time period had been proved in evidence there, *amicus* would yet contend that *Rock* is completely distinguishable here. Because the application there was accepted by use of an impostor for the second physical examination, that case has been distinguished as a case concerning a void, rather than a voidable, contract because the fraud went to the very factum of the contract of employment. *Neukirk* v. *Los Angeles Junction Ry.*, 21 Cal. 2d 308, 131 P. 2d 535, 543. This Brotherhood would nevertheless assert that the railroad in such circumstances should be required to prove that it had no knowledge of the impersonation at the physical examination before the injury in order to defeat any railroad policy of "lay and wait". *White* v. *Thompson*, 181 Kan. 485, 312 P. 2d 612 (1957). Moreover, *amicus* asserts that the mere fact of application under an assumed name does not waive the provisions of its collective bargaining contract for such applications were contemplated by the parties to these contracts. This is so because one of the purposes that this Brotherhood had in obtaining such contractual provisions was to destroy a railroad policy of blacklisting applicants who had been engaged in union activity on other railroads. This is further so because an additional purpose of this Brotherhood was to put an end to a practice by railroads of discharging employees who filed suit under the Federal Employers' Liability Act. (Railroad Retirement Board, *Work Injuries in the Railroad Industry, 1938-40, Report to Senate Committee on Interstate and Foreign Commerce, 77th Congress, Vol. I*, p. 37, 38 (1947)).

Since this Court's opinion in *Borum*, other courts have required that railroads prove that the misrepresentation must be of a physical condition and must bear a causal relation to the injuries sustained (The cases are exhaustively

discussed in *White* v. *Thompson*, 181 Kan. 485, 312 P. 2d 612.) Where its collective bargaining contracts are involved, this Brotherhood asserts that the railroad may not defend on allleged misrepresentations of physical condition whether the physical condition involved bears any "causal relation" to the injury or not. Absent such a contract, it is impossible to understand how such physical condition can bear a "causal relation" to the injury and thereby bar the employee's rights under the Federal Act. This is especially so when the 1939 Amendments to the Federal Employers' Liability Act are considered which broadened the class of employees covered by the Act and obliterated the defense of assumption of risk. In so doing, Congress removed the fetters which hobbled the full play of the basic congressional intention to leave to the jury the single question whether the negligence of the employer played any part, however small, in the injury involved in the suit, *Rogers* v. *Mo. Pac. R.R.*, 352 U. S. 500, 508, 509.

As this defense is now presented to juries, the jury is instructed that if there is any "causal relation" between the physical condition allegedly misrepresented, the jury should find for the employer. Under such instructions, the jury could find for the employer, though the evidence was overwhelming that employer negligence caused the injury, if the jury found that the physical condition at least partially contributed to cause the injury. With such findings, the basic congressional purpose could again be thwarted in such cases. Furthermore, no purpose is served in those cases where the employees' only physical condition is the condition allegedly misrepresented since the railroad can prove that the plaintiff has no injury but is seeking to recover for a pre-existing physical condition. Moreover, if the railroad is not negligent, the employee cannot recover no matter what his injury.

Unfortunately, the holdings in the cases which have interpreted *Borum* have used language which has been seized upon by the Referees of the National Railroad Adjustment Board. The awards involved concern employees who have been discharged and are seeking reinstatement from the Board. Unlike the Court decisions, the awards are not limited to alleged misrepresenfations as to physical conditions but include almost all types of alleged misrepresentations. The referees have relied on the Court decisions to deny reinstatement to employees who have been discharged following their lawsuits ostensibly because of misrepresentations in their application for employment and this is done despite collective bargaining contracts which create a time limitation on the right to discharge. Such was not the case before this defense was discussed by this Court. In one of the first cases before the First Division, the employer and employee representatives, without the necessity of a referee, held that the 90 day period there involved was a binding limitation. The division stated that the railroad had 90 days to make an investigation concerning the application and that the discharge was not justified when the time limit had expired. Reinstatement of the employee was ordered with seniority unimpaired and with pay for all time lost. *Award No. 66, Volume I, First Division Awards, NRAB.*

The time limits in such agreements were gradually chipped away by referees who are now uniformly used in reinstatement cases because of the failure of the division to reach agreement in such cases and, indeed, in almost all cases. The method used has been to seize on the discussion of "void" and "voidable contracts" in the judicial opinions and then to disregard the time limits entirely. The referees have refused the argument of the employees that their

contracts bar the discharge by ignoring the contracts and by relying on the court opinions. The method is clearly shown in *Award 16747, Volume 119, First Division Awards, NRAB*. There the referee states that the time limits have no application where "the employee engages in certain wilful and material falsification." The discharge is then upheld though the employee passed his physical examination when he applied for employment because of his back condition which is said to make him ". . . in a degree unfit, or at least undesirable, as an employee." Finally, Award 66 is rendered nugatory by the following sentences:

> "In Award 8302 this Division, the Referee Bakke, noted that the record in Award 66 does not disclose that the case of *Minneapolis, St. Paul, and Sault Ste. Marie versus Rock* 279 U. S. 410 came to the attention of the Board. That case supports the principle on which this decision rests."

The First Division's disregard of the time limits reached its culmination in *Award 19557, Vol. 144, First Division Awards, NRAB* (1960). There the referee asininely construed the time limit to apply only "to the application on its face" and denied the claim for reinstatement. The referee also showed particular solicitude for the carrier because it had paid two claims respectively of $644.50 and of $2,250.00.

These awards and many others raise a serious question as to whether the First Division is not exceeding its jurisdiction which is limited by the Railway Labor Act to disputes ". . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . ." *45 U.S.C. § 153 First (i)*. Far from interpreting and applying the contract, the Division seems to have adopted a policy of approving the discharge of employees who have asserted their rights under

the Federal Employers' Liability Act. Before this Court's opinion in *Chicago R. & I. R.R.* v. *B.R.T.*, 353 U.S. 30, the employees were free to strike when they were incensed by discharges in violation of their contract. Recently, all possibility of relief was taken away from the employees because of the decision by this Court in *Union Pacific R.R.* v. *Price* 360 U. S. 601 with its holding that an Adjustment Board Award denying reinstatement does not constitute a "money award" under the Railway Labor Act and that such an award is final and binding on the discharged employee.

The present disregard of the time limits established by contract arose because of this Court's decisions on the affirmative defense involved and because there has been no square holding by the courts that the time limit provided creates an absolute right to employee status once the time limit has expired. This Court, it is submitted, should decide this case on the basis of the time limit in the collective bargaining contract, should reverse the judgment herein, and should deny the affirmative defense asserted by the respondent.

II.

The conduct of respondent in disregarding the time limit established by rule and in relying on the terms of the application for employment contradictory thereof constituted the use of a contract, rule, regulation, or device prohibited by Section 5 of the Federal Employers' Liability Act.

Despite the clarity of the contract establishing the 30 day limit in this case, the carrier on its employment application form asserted the right to discharge the applicant without a hearing at any time if it found that a false representation

had been made. Following the trial below, respondent held a hearing and discharged the petitioner.

The respondent below in relying on the language contained in its application form sought, thereby, to affect the petitioner's right to sue under the FELA. Because of the unusual ruling of the trial court in holding that petitioner was not an employee of respondent as a matter of law, and that petitioner was not entitled to go to the jury on the question of "causal relation" between the physical condition allegedly misrepresented and the accident for which suit was brought, it is apparent that the trial court placed unusual emphasis on the employment application and disregarded the time limit established by the collective bargaining contract. In doing so, that court also disregarded all the cases which require such proof when the contract is declared to be "voidable". Such decision in this case had the effect of rendering the petitioner's contract "void" though there is no case which so holds in like circumstances. The employment application, therefore, is blatantly an attempt to change the status of employees to that of "non-employees" when the respondent finds any "false representation" on its comprehensive employment application. Such a change of status is prohibited by Section 5, 45 U.S.C. § 55. That Section prohibits any contract or device which obstructs the right of Liability Act plaintiffs to secure maximum recoveries if they elect judicial trials of their causes. *Boyd* v. *Grand Trunk Western R.R.*, 338 U.S. 263.

The use of employment applications so as to adversely affect the employees rights under the Federal Act is not unique. An attempt was so made in *Byler* v. *Wabash R.R.*, 8th Cir., 196 F. 2d 9, 12, to revive the defense of assumption of risk and was held void. A railroad attempt based on a

Pullman Company application was held to be an attempt to avoid obligations imposed by Congress in *Oliver* v. *Northern Pac. Ry.*, D. Ct., Washington, 196 F. 432. Likewise, a railroad attempt by means of its employment application to require the employee to assume the risk of close clearance under all bridges on the line was held void under Section 5. *Davis* v. *Crane*, 8th Cir., 12 F. 2d 355.

The instant case is a direct violation of Section 5 in that the respondent by its application obtained the judgment below which barred petitioner from the jury trial to which he was entitled. A broader question is also presented by this case because of the subsequent discharge of petitioner: Is an attempt by a railroad to compel the petitioner to choose between his rights under the Federal Act and his right to a job a violation of Section 5? *Amicus* submits that such compulsory choice is a violation thereof. It is also clear that the First Division has placed its stamp of approval on those railroads which are again enforcing this compulsory choice. See, e. g., *Award 19869, Docket 37104, Awards First Division, NRAB* (Not yet bound) (March 3, 1961) (Employee's lawyer alleged that he could not perform his duties. Case was settled before trial. Misrepresentation was omission of 6 days employment at Post Office during Christmas season during which employee strained thumb and left shoulder. Examining doctor at that time found employee to have arthritis. Judicial Notic taken that if arthritis known, carrier would have investigated period before 5 year period which it inquired about on employment application and would have discovered other conditions. Reinstatement denied.)

The courts have not been more considerate of the employee's seniority rights. In *Scarano* v. *Central R.R. of N.J.*, 3rd Cir., 203 F. 2d 510, it was held that an "estoppel",

for want of a more precise word, prevented an employee from obtaining his job back after trial where the railroad refused to give the employee the physical examination to which he was entitled under the applicable collective bargaining contract.

It is submitted that the respondent, for the reasons adverted to above, has engaged in practices which are void under Section 5 of the Federal Employers' Liability Act.

CONCLUSION.

In our discussion, we have shown that respondent has violated the applicable collective bargaining contract in asserting that petitioner was not an employee at the time of his accident and injury. The court below erroneously accepted respondent's contention and entered an erroneous judgment for respondent. We further pointed out that the use made of the employment application in this case is prohibited by Section 5 of the Federal Employers' Liability Act.

We submit that the decision of the court below is not only erroneous under the case law dealing with such affirmative defenses but is also erroneous by virtue of Section 5 of the Federal Employers' Liability Act.

Respectfully submitted,

JOHN J. NAUGHTON,
Attorney for the Brotherhood of Railroad Trainmen as Amicus Curiae.

CERTIFICATE OF SERVICE.

I, John J. Naughton, attorney for the Brotherhood of Railroad Trainmen, amicus curiae, do hereby certify that on the 6th day of September 1961 I served the attached brief of amicus curiae upon all parties of record herein by depositing copies thereof in the United States mails, via airmail, postage prepaid, addressed to Mr. Walter W. Burton, Law Building, Princeton, W. Va., and to Sachs and Jenkins, Woodward Building, Washington 5, D. C., attorneys for Petitioner; and to Mr. Joseph M. Sanders, Law and Commerce Building, Bluefield, W. Va., attorney for Respondent.

.....

JOHN J. NAUGHTON.